(14)

No. 86-421

In The Supreme Court
OF THE
United States

OCTOBER TERM, 1986

BOARD OF DIRECTORS OF ROTARY INTERNATIONAL; *et al.*,
Appellants,

v.

ROTARY CLUB OF DUARTE; *et al.*,
Appellees.

On Appeal From the Court of Appeal
of the State of California,
Second Appellate District

BRIEF OF THE BOY SCOUTS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLANTS ROTARY INTERNATIONAL, ET AL.

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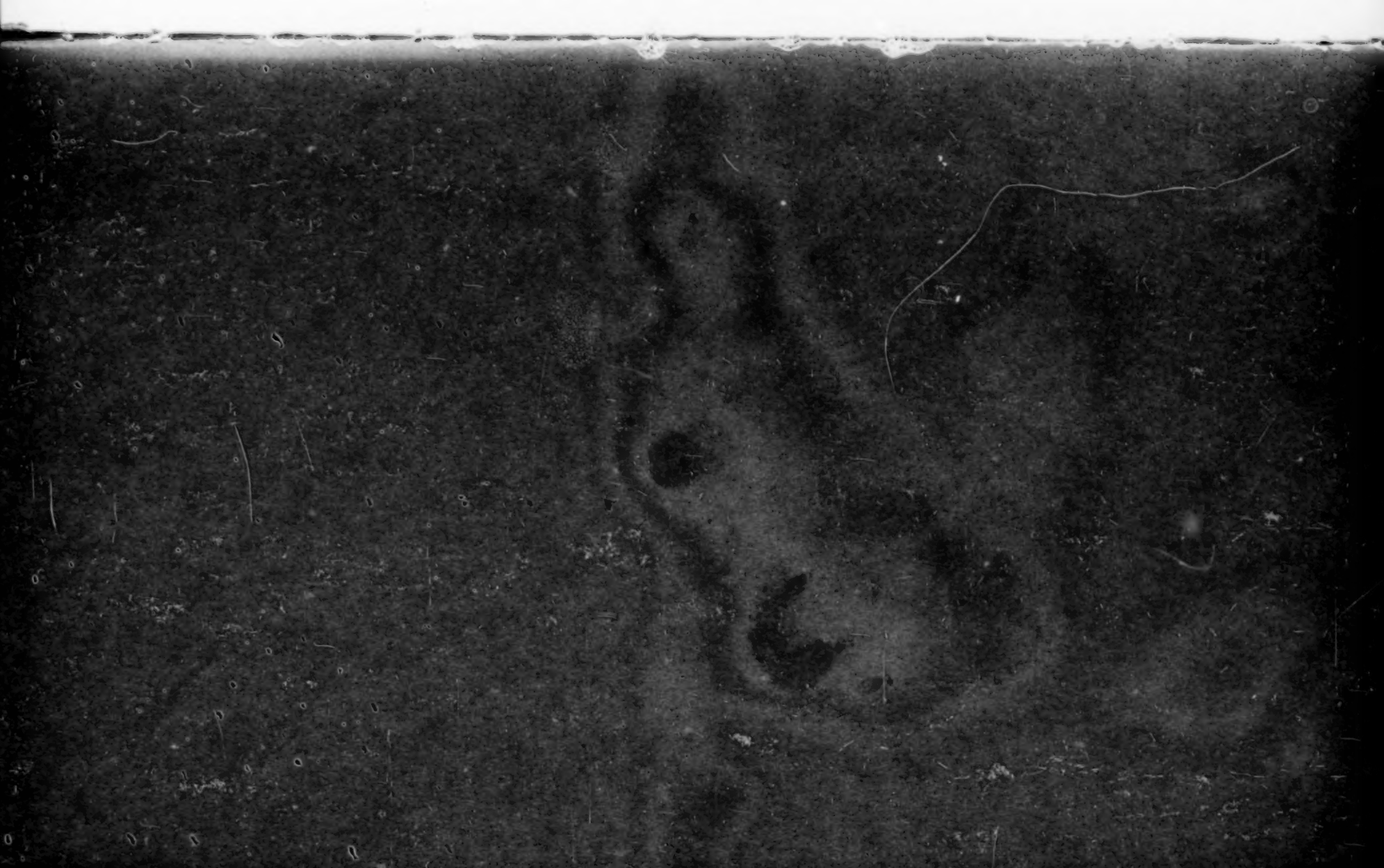

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The Boy Scouts of America, as *amicus curiae*, supports reversal of the judgment of the Court of Appeal of the State of California, Second Appellate District. 178 Cal. App. 3d 1035 (1986).

INTEREST OF THE AMICUS CURIAE

The Boy Scouts of America is a voluntary, nonprofit membership organization chartered by Congress in 1916

> "to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues." 36 U.S.C. § 23.

Boy Scouts accomplishes this mission through thousands of individual Scout troops, Cub packs and Explorer posts at the neighborhood level. Of principal significance to this brief is the Scout troop, a small, intimate group of approximately 15 to 30 boys, which is Scouting's means of teaching and training boys primarily aged 11 through 14. Each troop is led by an adult male member, a Scoutmaster. Because Boy Scouts believes that the inculcation of its values in 11 to 14 year old boys is better accomplished by a male whom the boys may imitate, the Scoutmaster must believe in the values and principles of Scouting. In addition, the Scoutmaster must be, and must be perceived as, the type of individual to whom parents may entrust their sons for weekly meetings, overnight hiking and camping trips and summer camp.

This case presents issues of vital interest to the Boy Scouts because the California Court of Appeal's zealous enforcement of state laws without sufficient sensitivity to the Constitutional rights of association, which may well be followed by other courts, threatens Boy Scouts' ability to select Scoutmasters necessary to accomplish the purposes of Scouting. Indeed, Boy Scouts' determination that its associational mission needs male Scoutmasters who believe in the values of Scouting presently is under attack in a number of state courts. A case now pending in California challenges Boy Scouts' right to select only leaders who share its moral beliefs.[1] The case seeks to

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[1] *Curran v. Mt. Diablo Council of the Boy Scouts of America*, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), *hearing denied*, (Cal. January 6, 1984), *appeal dismissed*, 468 U.S. 1205 (1984). The Court of Appeal held that, assuming plaintiff could prove the allegations of his complaint, Boy Scouts (and the local council involved there) were "business establishments" that could not lawfully exclude homosexuals from the position of Scoutmaster. The parties in *Curran* have postponed trial in order to obtain the benefit of the Court's guidance in this case.

force Boy Scouts to accept as a Scoutmaster an individual who is a practicing homosexual and a public advocate of the morality of homosexual conduct. Boy Scouts holds as one of its fundamental values that homosexual conduct is not moral.[2]

Cases now pending in other states seek to force Boy Scouts to accept women as Scoutmasters and thereby deny Boy Scouts their basic tenet that a male role model is the appropriate teacher and transmitter of Scouting values in boys who are just coming of age.[3]

This case provides the Court with an opportunity to establish standards that will shield Boy Scouts and similar organizations from unwarranted governmental interference into the exercise of their protected associational rights. While Boy Scouts' interests in selecting Scoutmasters is qualitatively different than the interests of Rotary members in associating only with men, both raise rights deserving of Constitutional protection. In protecting First Amendment freedoms and "in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar."

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[2]This Court recently recognized that "Condemnation of [homosexual] practices is firmly rooted in Judeao-Christian moral and ethical standards." *Bowers v. Hardwick*, ____U.S. ____, 106 S. Ct. 2841 (1986) (Burger, C.J., concurring).

[3]*Pollard v. Quinnipiac Council, Boy Scouts of America*, PA-SEX-37-3 (Conn. Comm. on Human Rights and Opportunities) (decision of hearing examiner, January 4, 1984), *vacated*, (Conn. Super. Ct. May 19, 1986), *on appeal*, (Conn. Supreme Ct.); *Adamski v. Suffolk County Council of the Boy Scouts of America*, P-S-73766-80 (N.Y. Div. of Human Rights). Women serve in positions throughout the Boy Scouts' organization, including at the highest levels. The exception is the troop Scoutmaster where Boy Scouts believes that a male role model provides the most effective way to help boys mature into men.

NAACP v. Button, 371 U.S. 415, 432 (1963). This Court also has recognized that "First Amendment freedoms need breathing space to survive." *Id.* at 433. Accordingly, Boy Scouts urges this Court to consider the impact upon Scouting of the extremely broad interpretation given the California public accommodation statute. Boy Scouts further urges the Court to vindicate the Constitutional rights of Rotary and, in so doing, to send a message to the courts and potential litigants that truly private associations, like the Rotary and the Boy Scouts, have the right to determine membership policies free from state intrusion. This brief analyzes the nature of these Constitutional rights and demonstrates their applicability both to the appellant and to this *amicus curiae*.

SUMMARY OF ARGUMENT

I

The Constitution protects from state interference the individual's right to enter into and maintain certain close relationships. The relationships protected by the right of intimate association are those that are small, selective and secluded at the level at which the relationship is formed and nurtured. Among the most highly protected intimate associations are those between children and the adults to whom their education and development are entrusted.

Individuals form protected intimate associations in both local Rotary clubs and Boy Scout troops. Each is small in size, select in membership, and secluded in its principal activities.

II

The Constitution also protects from state interference individuals' rights to group together to enhance and

strengthen their shared beliefs in pursuit of common goals. There can be no greater interference with the exercise of the right of expressive association than the forced admission into the group of individuals who espouse contrary beliefs or goals from those shared by the membership. The state can so interfere with the right of expressive association only by showing that its interest is compelling.

The state has a significant interest in ending certain invidious discriminations that deny individuals the ability to advance themselves economically. However, the state has little or no interest in regulating private, purely social relationships. Accordingly, the state's interest in regulating the membership policies of a private group that does not confer economic or business advantage on its members falls far short of compelling.

This fundamental proposition controls the instant case and those cases involving the expressive associational rights of Boy Scouts. Boy Scouts' purpose is not to confer economic or business advantage on its members, but rather to develop the character and fitness of boys. The Scoutmaster's only reward is the satisfaction derived through service to others. Similarly, Rotary is not economically motivated and in fact expressly discourages its use for economic or business gain. The state has no compelling interest in regulating either organization's membership.

III

The California public accommodations statute, as interpreted by the California courts, impermissibly chills First Amendment associational rights. Groups such as the Boy Scouts must guess as to whether the statute applies to them and, if so, what "discrimination" it prohibits. This Court should strike down the California statute as vague

and overbroad or set out in the clearest terms possible the protection to be afforded to such associational rights.

ARGUMENT

I

THE COURT SHOULD PROTECT INTIMATE ASSOCIATIONS FROM STATE INTERFERENCE

This Court only recently reaffirmed the independent Constitutional status of the right of intimate association. In *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984), the Court held that the Constitution protects the individual's "choices to enter into and maintain certain intimate human relationships" against intrusion by the State. These close relationships and the resulting personal bonds deserve Constitutional protection because they cultivate and permit the transmission of shared ideals and beliefs. Such relationships create the close ties from which individuals draw much of their emotional enrichment. *Id.* at 618-19. As the Court stated:

> "Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." *Id.* at 619.

This Court's *Roberts* opinion articulated standards to govern the determination of which intimate associations deserve Constitutional protection. The relevant inquiry focuses on the characteristics of the association at the level at which the individual members interact. Specifically, the Court found that the human relationships fostered by association at that level generally "are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Id.* at 620. By being small,

select and secluded at the level of interaction, the association facilitates the cultivation of shared values and emotional bonds which are the essence of the Constitutional freedom.

At one end of a spectrum of associations are organizations, such as the Jaycees, entitled to little or no constitutional protection because the activity central to the formation and maintenance of the association involves large and basically unselective groups in which strangers to the relationship may participate. *Id.* at 620-21. At the other end are the intimate relationships among family members and most especially parents and their children that are entitled to the greatest protection. *Id.* at 619-20. "The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and '[r]ights far more precious . . . than property rights.'" *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citations omitted). Accordingly, "[t]his Court has long recognized that freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974).

The Constitutional liberty of parents to direct the upbringing and education of their children protects from unwarranted state interference the relationships between children and those to whom parents entrust their education and guidance. The Court has long recognized that the teacher's right to teach and the parent's right to engage teachers for their children are among the basic Constitutional liberties guaranteed by the Fourteenth Amendment. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-40 (1923). These rights rest upon the principle that:

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any gen-

> eral power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. at 535.
>
> "The duty to prepare the child for 'additional obligations,' referred to by the Court, must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship."

Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).

The education of children is not limited to the classroom. Groups such as the Boy Scouts and Girl Scouts prepare youth for such "additional obligations" outside of the formal educational process. Boy Scouts' methodology for so educating 11 to 14 year old boys is through the intimate association of small groups of boys in a troop led by its Scoutmaster. Boy Scouts believes that providing a close personal relationship outside of the home with an adult male who endorses Boy Scouts' values helps boys in the difficult process of maturing into men. The boys thereby develop character, learn moral standards and citizenship and draw emotional support.

The Boy Scout troop satisfies all of the *Roberts* standards for protected intimate association. It is small, ranging in size from 15 to 30 boys. While all boys and adult Scoutmasters also are members of the nationwide Boy Scouts' organization, that fact does not deprive the troop of its Constitutional protection because it is the emotional bonds and camaraderie formed within a local troop that provides the intimate association around which the Scouting program revolves. Boys in a troop usually meet weekly and together go on overnight camping trips

several weekends a year, developing regular, continuous, social and personal relationships.

The Boy Scout troop is selective in its choice of a leader to fill the position of Scoutmaster. Consistent with the Boy Scouts' goal of providing boys aged 11 through 14 with a male role model from whom they can learn by imitation, the Scoutmaster must be a man who endorses the Boy Scouts' goals and values. Boy Scouts closely examines an applicant's qualifications and morals, as well as his belief in the fundamental principles of Boy Scouts.

Finally, the Boy Scout troop is seclusive in the critical aspects of its relationship to the boys. The principal activities of the troop are limited to Scouts themselves, and those who are not members do not ordinarily participate. Therefore, the small, select and secluded human relationships between boys and men fostered in a Boy Scout troop are protected by the Constitutional right of intimate association.

The standards set forth in the *Roberts* opinion similarly support the Rotary's right of intimate association, which the State of California seeks to destroy by requiring the Rotary to admit women as members. While lacking the highest protection afforded child-rearing and educational association, the Rotary organization fosters human relationships which at the local level are small, selective and secluded. Local Rotary clubs average no more than 46 members and are highly selective in admitting members. Membership in a local Rotary club is restricted to males, by invitation only, and is not solicited from nor available to the public generally. Members meet in weekly meetings closed to the public and participate in Rotary activities limited to members. The Rotary organization fosters bonds of personal friendship and the values of charitable service in an intimate club setting. Accordingly, the Constitutional right of intimate association protects Rotary

from state intrusion compelling it to admit women. The Court should so hold by reaffirming its *Roberts* opinion in language sufficiently clear to protect similar organizations from state interference.

II

THE COURT SHOULD PROTECT EXPRESSIVE ASSOCIATIONS FROM STATE LAWS THAT WOULD FORCE THE ADMISSION INTO MEMBERSHIP OF INDIVIDUALS WHOSE EXCLUSION DOES NOT RESULT IN ANY COMMERCIAL OR ECONOMIC DEPRIVATION

A. The Constitutional Protection Of The Freedom Of Expressive Association.

The Court has long recognized as a basic Constitutional right the freedom of an individual to associate for the purpose of advancing shared beliefs and ideas. *Democratic Party v. Wisconsin*, 450 U.S. 107, 121 (1981); *Abood v. Detroit Board of Education*, 431 U.S. 209, 233 (1977); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam); *Healy v. James*, 408 U.S. 169, 181 (1972); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). The Court in *Roberts* reaffirmed the right of the people to form groups to pursue social, cultural, religious, and educational ends:

> "An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed .... Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in the pursuit of a wide variety of political, social, eco-

> nomic, educational, religious, and cultural ends." 486 U.S. at 622.

The individual members of a group use their association to facilitate and strengthen the expression of their own views. Insistence on undiluted adherence to the groups goals, values or characteristics gives a group its cohesiveness and makes possible its collective effort in pursuit of shared goals. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . ." *NAACP v. Alabama*, 357 U.S. at 460. Whether the shared goal is best achieved through association with people of the same political belief, with people of the same sex or marital status, or with people of the same moral values, the group's binding together for the common goal fosters the presentation of various points of view and ideas and preserves the diversity that is so essential to a free society. *See Roberts v. United States Jaycees*, 468 U.S. at 622; *NAACP v. Alabama*, 357 U.S. at 462-63.

Boy Scouts engages in the very type of expressive association long protected by this Court. Justice O'Connor recognized explicitly in her concurring opinion in *Roberts* that Boy Scouts engages in protected expressive association. Citing Girl Scouts and Boy Scouts publications, Justice O'Connor wrote that

> "Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." 468 U.S. at 636.

Justice O'Connor correctly appreciated Boy Scouts' devotion to advancing its own particular set of values and furthering its central purposes of developing moral character, educating boys in the responsibilities of citizenship,

and developing personal fitness, including physical, mental, moral and emotional fitness. Boy Scouts pursues these aims through a program emphasizing outdoor camping and hiking, peer group leadership, and community service.

The Boy Scout values embodied in the Scout Oath and Scout Law [4] are an integral part of the Scouting program.

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[4]The words of the Scout Oath are

"On my honor I will do my best
To do my duty to God and my country
And to obey the Scout Law;
To help other people at all times;
To keep myself physically strong,
Mentally awake, and morally straight."

The Scout Law provides that a Scout is

"TRUSTWORTHY. A Scout tells the truth. He keeps his promises. Honesty is a part of his code of conduct. People can depend on him.

LOYAL. A Scout is true to his family, Scout leaders, friends, school, and nation.

HELPFUL. A Scout is concerned about other people. He does things willingly for others without pay or reward.

FRIENDLY. A Scout is a friend to all. He is a brother to other Scouts. He seeks to understand others. He respects those with ideas and customs other than his own.

COURTEOUS. A Scout is polite to everyone regardless of age or position. He knows good manners make it easier for people to get along together.

KIND. A Scout understands there is strength in being gentle. He treats others as he wants to be treated. He does not hurt or kill harmless things without reason.

OBEDIENT. A Scout follows the rules of his family, school, and troop. He obeys the laws of

Even before a boy may become a member, he must satisfy his Scoutmaster that he intends to live by the Scout Oath and Scout Law. Thereafter, each Scouting activity has as its purpose the inculcation in its members of these and other values. For example, through outdoor camping and hiking activities Scouts learn to share responsibilities, live with others, learn outdoor survival skills, and develop an appreciation for nature. Scouting provides a series of challenges for the Scout for which he is rewarded by a merit badge or progress award after the achievement of each challenge. Earning each award increases the Scout's self-confidence and self-reliance and furthers the Scout along the path of self-improvement. At weekly meetings

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his community and country. If he thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobey them.

CHEERFUL. A Scout looks for the bright side of things. He cheerfully does tasks that come his way. He tries to make others happy.

THRIFTY. A Scout works to pay his way and to help others. He saves for unforeseen needs. He protects and conserves natural resources. He carefully uses time and property.

BRAVE. A Scout can face danger even if he is afraid. He has the courage to stand for what he thinks is right even if others laugh at or threaten him.

CLEAN. A Scout keeps his body and mind fit and clean. He goes around with those who believe in living by these same ideals. He helps keep his home and community clean.

REVERENT. A Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others."

or evening campfires the Scoutmaster often makes a moral message a part of the program.

Rotary engages in the same types of protected expressive association. It is organized to "provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world." Rotary achieves these objectives through a program designed to encourage congeniality and fellowship among business and professional men. The Rotary ideal is "Service Above Self." As a group, the Rotarians participate in many community service and civic-oriented activities. These activities are voluntary and uncompensated. Weekly Rotary meetings and participation in service projects promote the camaraderie that each individual member and the group as a whole strive to achieve.

B. There Is No Clearer Interference With The Right Of Expressive Association Than The Forced Admission Of Individuals With Contrary Views.

Before *Roberts*, the Court recognized that the right to define a group's identity and purposes through membership criteria is an essential ingredient of the freedom of association. The First Amendment right "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party v. Wisconsin*, 450 U.S. 107, 122 (1981).[5] The right "would prove an empty guarantee if associations could not limit control over their decisions

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[5] " 'The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.' " *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974), *quoting Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-80 (1972) (Douglas, J., dissenting).

to those who share the interests and persuasions that underlie the association's being.' " *Id.* at 122 n.22. *Roberts* confirmed that:

> "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate." 468 U.S. at 623.

The lower courts, however, have not heeded this Court's interdiction. In cases like this one and those involving Boy Scouts, the courts have announced an intention to force associations to accept members whom they not only do not desire but whose admission would be fundamentally inconsistent with the continuation of the association. For example, control of Boy Scouts' membership policies, and especially its policies as to the selection of Scoutmasters, is critical to the Boy Scouts' inculcation of values and beliefs. By carefully selecting its adult role models, the Boy Scouts ensure the transmission to the boys of these values and beliefs. Yet, in contradiction of its values, the *Curran* case in California seeks to require the Boy Scouts to make an advocate of the morality of homosexual conduct a Scoutmaster or Assistant Scoutmaster.

Similarly, in this case, the California Court of Appeal seeks to force Rotary to admit women in direct conflict with Rotary's belief that its male-only policy is essential to its prized camaraderie and fellowship. This state intrusion would be widely felt within the organization for the reasons reviewed more fully in Rotary's brief.

C. The State Lacks A Compelling Interest In Forcing The Admission Into An Association Of Individuals Whose Exclusion Does Not Deprive Them Of Commercial Or Economic Advantage.

The state's interest in overriding the rights of an association to determine its membership must be compelling:

> "Infringements on [the right to associate] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."

Roberts, 468 U.S. at 623; *Democratic Party v. Wisconsin*, 450 U.S. 107, 124 (1981); *Cousins v. Wigoda*, 419 U.S. 477, 489 (1975); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *NAACP v. Alabama*, 357 U.S. 449, 463 (1958). The state therefore cannot automatically justify its action by amorphously stating that it seeks to end all discrimination. It is discrimination — in the non-insidious sense of selection or differentiation — that is at the heart of associational freedom. *Roberts* does not hold to the contrary. Rather, the Court in *Roberts* simply determined that the Jaycees failed to demonstrate either a sufficiently serious intrusion into its associational rights or the inadequacy of the allegedly compelling state interest.

The *Roberts* Court first analyzed the burden imposed by the state public accommodations law on the membership policies of the Jaycees. 468 U.S. at 626. Although the Court recognized that a substantial part of the Jaycees' activities were protected expression, it was unable to conclude that forced admission of women, who already participated in much of the group's training and community activities, would burden the protected expression of the organization:

> "There is, however, no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views. The Act requires no change in the Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." 468 U.S. at 627.

After determining that there were no serious burdens on the male members' freedom of association, the Court turned its attention to the state's interest in regulating the Jaycees' membership. Because it found that the Jaycees was essentially commercial in nature, the Court found that the state's interest was compelling:

> "[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent." 468 U.S. at 628.

The state law intrusions into the membership policies of Boy Scouts and Rotary both more directly impair the organizations' ability to engage in their protected activities and serve far less important state interests. As previously demonstrated, forced admission of individuals with views contradictory to those of each organization places a serious burden on each organization's freedom of expressive association. A requirement that the Boy Scouts admit individuals who are diametrically opposed to Scouting values places a serious burden on the freedom of expressive association of its members. Since Boy Scouts believes homosexual conduct is immoral, forced admission of individuals who believe homosexual conduct is moral destroys Boy Scouts' "ability to exclude individuals with ideologies or philosophies different from those

of its existing members," 468 U.S. at 627, and interferes severely with Boy Scouts' ability to "engage in [its] protected activities or to disseminate its preferred views." *Id.* The freedom of association of Rotary members is similarly impaired, as reviewed more fully above and in Rotary's brief.

On the other side of the balance, the state's interest in regulating the membership policies of Boy Scouts or Rotary is not compelling. Neither Boy Scouts nor Rotary is economically or commercially oriented. The position of Scoutmaster is a volunteer position. The only reward that the Scoutmaster receives is spiritual enrichment through service to others and the satisfaction of watching boy members develop. Rotary is a service and fellowship organization, which expressly discourages use of Rotary for economic or business gain. Members receive no economic gain from their service and community projects.

Justice O'Connor, concurring in *Roberts*, refused even to examine the seriousness of the state's intrusion into associational rights, but instead would determine whether the state's interest is compelling solely by examining the nature of the association. The state interest would be compelling only where the association is primarily commercial:

> "Many associations cannot readily be described as purely expressive or purely commercial. No association is likely ever to be exclusively engaged in expressive activities, if only because it will collect dues from its members or purchase printing materials or rent lecture halls or serve coffee and cakes at its meetings. And innumerable commercial associations also engage in some incidental protected speech or advocacy. The standard for deciding just how much of an association's involvement in commercial activity is enough to suspend the association's First

> Amendment right to control its membership cannot, therefore, be articulated with simple precision. Clearly the standard must accept the reality that even the most expressive of associations is likely to touch, in some way or other, matters of commerce. The standard must nevertheless give substance to the ideal of complete protection for purely expressive association, even while it readily permits state regulation of commercial affairs." 468 U.S. at 635.

Boy Scouts and Rotary are certainly not economically or commercially oriented within the standards contemplated by Justice O'Connor.

III

THE COURT SHOULD PREVENT THE IMPERMISSIBLE CHILLING OF FIRST AMENDMENT ASSOCIATIONAL RIGHTS.

This Court repeatedly has recognized that "standards of permissible statutory vagueness are strict in the area of free expression," and "the government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 432-33 (1963). The reason for this rule is apparent:

> "[First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *Id.* at 433.

The California public accommodations statute, as interpreted by the California Courts, lacks such specificity. While limited by its terms to "business establishments," the statute has been extended to cover some noncommer-

cial entities as well.[6] The California Supreme Court has further deprived that term of specific meaning by expressly reserving judgment as to whether it includes any and all associations serving a particular sex or age group.[7] In addition, the state's prohibition of "arbitrary' discrimination of any kind"[8] without a meaningful definition of that highly subjective term leaves associations without any assurance that their Constitutional rights will be protected. As a result, lawsuits such as those brought against Rotary and Boy Scouts are "chilling" the First Amendment associational rights of organizations in California. The Court must act to protect those rights by either striking down the California statute as impermissibly vague and overbroad *or* by confirming in the strongest possible terms the Constitutional protections to be afforded the rights of intimate and expressive association. Only then will the First Amendment freedoms of Boy Scouts, Rotary and others have the necessary "breathing space to survive." *Id.* at 433.

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[6] *Curran v. Mount Diablo Council of Boy Scouts*, 147 Cal. App. 3d 712, 732-33, 195 Cal. Rptr. 325 (1983).

[7] *Isbister v. Boys' Club of Santa Cruz*, 40 Cal. 3d 72, 82 n. 8, 707 P.2d 212, 219 Cal. Rptr. 150 (1985).

[8] *Id.* at 86.

CONCLUSION

The judgment of the California Court of Appeal should be reversed.

Respectfully submitted,

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